Addressing Government Contract Claims Through ADR

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When Is a Claim Ready for ADR?

- Availability of Information – Discovery, Audits, Third Party Witnesses: Subcontractors, Ex-employees, etc
- Willingness of Parties to Engage
- Issues sufficiently developed.

When is a Claim Ready? Fiscal Issues

- Availability of Money
  - Settlements contingent on availability of funds
  - Know the status of the appropriation
    - Current
    - Expired
    - Cancelled
- Access to the Judgment Fund

ADR Mindset

- ADR requires a different skill-set
- Interest-based negotiating vs. position-based negotiating
- Attitude is everything – have a clear walk-away position, but commit yourself to absolutely exhausting all possible options before you get there.

Selection of ADR Type

- The earlier you engage, the more options you will have – generally the less formal, the better.
- Consider ability of parties to communicate, work together
- Weigh costs of third party intervention vs. ability to move parties towards resolution.
- Graduated Approach – start out informal and use third party intervention only if necessary.

Selection of ADR Type

- Structured Negotiations
- Mediation
- Settlement Judge
- Summary Trial

Selection of ADR Neutral and Gov't Team

- Team Members – Program Manager, CO, CA, Engineer, Inspector are musts; consider using activity, auditor, etc…
- Principal – generally the CO: but consider others if they have the skill set
- ADR Neutral – ASBCA Judges & more…

Preparation for a Good ADR

1. Make this Your ADR.
2. Establish Strategy Early.
3. Surround Yourself with Expertise But
4. Create An Environment Conducive to Resolution.
5. Every case can and should be settled according to mutually agreeable terms.

Preparation (cont'd) – Establish ADR Strategy Early

- Identify ADR team members and seek commitment to prepare and present.
- Bring out all strengths and weaknesses - **this is the time** for hashing out disagreements and developing goals for ADR.

Preparation (cont'd) - Surround With Expertise, But Speak With One Voice

- The ADR decision maker must have legal, technical and administrative help real time.
- However, ADR participants with speaking roles should be limited.
- The support team should hear all presentations, but limit the size of the government team in breakout and negotiation

Preparation (cont'd) - Create an Environment Conducive to Resolution

- Block Off the Time (no really…)
- Select an ADR location that works for everyone - free from distractions
- Make sure you have a sufficient space to conduct the ADR

Preparation (cont'd) - Create an Environment Conducive to Resolution

- Ideally....
  - large conference room for meetings with both sides
  - separate meeting rooms for breakout sessions
  - office for mediator/ third party neutral
  - access to fax, copier, computer, telephones, PowerPoint projector, video, etc...;

Making an ADR Work

1. Use a Presentation style that suits you and suits your case.
2. Listen to your Opponent
3. Identify Impediments to the Process Early
4. Don’t be Afraid to Step Away from the Table

The pie may be bigger than your think (it's not just about the money)

- Contractor Concerns that may be addressed through ADR
  - Time Value of Money
  - Past Performance Evaluation
  - Warranty Issues
  - Affirmative Claims Against the Contractor

Legal Considerations -Privilege Issues

- Preservation of privileges in ADR agreement
- Privileges
  - Attorney-Client
  - Attorney Work Product
  - Deliberative Process (Not Easy To Obtain)
- Most Material is not Privileged!

Legal Considerations - Releases

- Far 43.204 Language Inadequate
- Broad, Non-Specific Releases Encourage Revisionist History
  - Identify Precisely What is Released, What is Not
- Exceptions Narrowly Construed
- Prepare Detailed PNM (Include Negotiations)

Successful ADR

- ADR requires a special skill-set and a special mindset.
  - Establish Strategy Early
  - Speak with One Voice,
  - Provide an Environment Conducive to Resolution
  - (But don’t be afraid to step away from the table.)
- ADR allows resolution of cases on mutually beneficial terms – something that will not happen in litigation.

Specific Problems/Questions?

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